
U.S. Department of Labor
Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 409
Boston Massachusetts 02109

DATE: November 2, 1987

CASE NO. 86-ERA-39

IN THE MATTER OF

TERRY G. DYSERT
COMPLAINANT

v.

WESTINGHOUSE ELECTRIC CORP.
RESPONDENT

Appearances:

Sandra R. Kushner, Esq.
For Complainant

Stuart Saltman, Esq.
For Respondent

BEFORE: GEORGE G. PIERCE
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING COMPLAINT

This is a proceeding under the Energy Reorganization Act of 1974, 42 U.S.C. 5851 and the implementing regulations found

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in 29 Code of Federal Regulations Part 24, whereby employees of employers subject to the Act and regulations may file complaints and receive certain redress upon a showing of being subjected to discriminatory action resulting from protected activity. The hearing on this matter was held in Pittsburgh, Pennsylvania on January 13 through 18, 1987. The parties appeared and were given the opportunity to present evidence and argument. Briefs were received from both parties and have been given full consideration.

Procedural History

This case stems from a complaint filed by Mr. Terry G. Dysert with the Employment Standards Administration, Wage and Hour Division, of the U.S. Department of Labor, alleging he was subjected to discriminatory conduct by, Westinghouse Electric Corporation because of certain activity protected by Section 5851(a)(1-3) of the Energy Reorganization Act (herein referred to as the "ERA") 42 U.S.C. Sec. 5851 (1974). Specifically, Dysert contends that his voicing of several nuclear safety concerns to his immediate supervisor and Westinghouse management resulted in his termination on July 18, 1986. After efforts to conciliate the matter failed, an investigation was conducted by the wage and Hour Division. Based on that investigation, the Area Director issued his determination concluding that "Dysert was a protected employee engaging in a protected activity within the ambit of the Energy Reorganization Act and that discrimination as defined and prohibited by the statute was a factor in the actions which comprise his complaint." (JX B) . A timely request for hearing was filed (JX C) and the matter was then remanded to the Office of Administrative Law Judges for hearing and the issuance of a recommended decision and order.

Stipulations

During the course of the hearing on this matter, the parties stipulated to the following material facts:

1. This proceeding was held pursuant to 42 U.S.C. Section 5851 and is governed by said statutory provision;
2. The quality and safety of the systems involved are not themselves in issue;

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3. Georgia Power Company and Westinghouse Corporation are two separate corporate entities;

4. Between July 11 and 31, 1986, Complainant made several anonymous telephone calls to Georgia Power Quality Concern personnel; on July 31, 1986 he again called Georgia Power Quality Concern personnel, this time identifying himself in addition to stating quality concerns;
5. Complainant received written communication, dated either July 31 or August 1, from Georgia Power Company concerning quality concern issues;

6. Complainant met with Georgia Power Company representatives concerning quality concern issues on August 21, 1986, at which time documents concerning said issues were passed from Complainant to Georgia Power Company representatives.

Summary of the Evidence

Complainant, Terry Dysert, graduated from college in 1972 with a degree in general engineering. He thereafter received a masters degree in industrial management in addition to completing several courses in a masters program in nuclear engineering. Complainant's employment prior to that at Westinghouse included work as a licensing and fuel planning engineer for Sargent & Lundy Engineers and as an analyst of construction projects for Chicago Service.

In July 1981 Complainant was hired by Employer as a senior engineer in what later became known as its Nuclear Service Integration Division (NSID). In August 1984 Complainant transferred into the Electrical and Instrumentation Systems Organization (EISO), a department within NSID. He was assigned to the Instrumentation Systems Service (ISS) group within this department.

The hierarchy of authority within the ISS group, in descending order, is as follows: 1. Joel Terry - manager of EISO; 2. William Pekarek - manager of ISS; 3. Mark Marscher - lead engineer in ISS group. The field service engineers, such as Complainant, are formed into small teams assigned to work at the various nuclear power sites. For each particular job,

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a team leader -- picked from among the team members -- is designated as coordinator of the team. The duties of the team leader include scheduling the work to be performed by the team and reporting back to Employer the progress of this work, and assigning jobs to be performed by the individual team members. (TR 68, 590, 1493).

On June 10, 1986 Complainant was assigned as a member of a team employed to "fill" and "start -up" Georgia Power Company's Vogtle Nuclear Power Station. According to Complainant, he was initially informed that this job would be approximately a two-week project (TR 64). Mr. Pekarek, on the other hand, testified that he informed Complainant that this job would require thirty days for its completion. (TR 746).

The Vogtle facility was a new construction site that was being prepared for operation. The team to which Complainant was assigned was in charge of testing the reactor vessel level instrument system (RVLIS). RVLIS is a detection system used to monitor the level of water within the reactor vessel. In this particular case, the Employer supplied the equipment for the system which Georgia Power then installed. The Employer, through the team, then inspected the installation, filled the system and, finally, calibrated the system. As stated by Complainant:

"the function of the team was to make sure that the equipment was the correct equipment that was supplied and that it was put in the right locations, that it was pressure tested so that there were no leaks in the system. Then it was to be filled with pure de-aerated demineralized water and then testing to make sure that this had been done correctly and the calibration of the system."

(TR 71)

In addition to Complainant, the members of the team assigned to the Vogtle project were Jim Lash, Gary Scott and Richard Kerr. Kerr was selected to be the coordinator, or team leader, of this team. All team members were associate field service engineers. As per the Employer's company policy, all of the team members stayed at the same hotel, in this case the Ramada Inn in Augusta Georgia. The record evidence indicates that, in addition to staying at the same hotel, the team members generally rode together to and from

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the work site, a forty-five minute drive from the hotel. It is also the Employer's policy that only one rental car be allocated per team; any additional rental cars were not considered a reimbursable item by the Employer without its prior approval. (EX 19).

On June 13, 1986, the team was involved in performing a pressure test of the RVLIS. The purpose of this test is to measure the pressure of the nitrogen -- the fill medium -- in order to determine whether any leaks exist. In order to make this determination, approximately 2,400 pounds-per-square-inch (psi) of pressure are gradually put into the system. A gauge is then continually monitored to ascertain whether there is any loss of pressure, which would signify the presence of a leak within the system. For this particular test, an Amatek gauge was used, and the time span during which the pressure was monitored was forty-five minutes. Kerr and Scott were monitoring the pressure in the isolator area while Complainant and Lash were doing the same in the transmitter area, located one or two floors beneath the isolator area.

During the running of this test, Complainant discovered a leak in the system which did not register on the gauge. Complainant told Lash of this discovery but did not immediately inform the other team members. When the test was almost completed (i.e., the forty-five minute period had nearly expired) Complainant went to where Kerr and Scott were stationed and told Kerr that the results of the test were invalid. Complainant then stated to Kerr that, in his opinion, a Heise gauge was needed to properly run the pressure test. It is Complainant's testimony that the Heise gauge is a more accurate gauge in that it rounds off to the nearest tenth of a pound whereas the Amatek gauge only rounds off to the nearest pound. (TR 80) Kerr testified that he only has knowledge of gauges of either type which measure in the whole pound. (TR 1419) Aside from his belief as to the greater accuracy of the Heise gauge, Complainant's dissatisfaction with the use of the Amatek gauge stemmed from the fact that: 1. The Heise gauge had been

specifically ordered for use in a prior RVLIS project for Duke Power; and 2. Employer's procedures for field filling of the RVLIS call for "Heise gages to cover the plant specific calibrations with traceable calibration status." (CX 15)

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Complainant testified that Kerr became angry when told by Complainant that there were Problems with the pressure test just performed. Complainant provided the following account regarding Kerr's response to Complainant's concerns:

> "The substance of what he said was that if I didn't agree to this that he would make me stay all night long if that's what it took and I would agree by then that this had passed the pressure test. He took it very personally."
>
> (TR 82).

Testimony elicited from the remaining team members indicates that, at the time Complainant voiced his complaint, Kerr was unaware that a leak had been detected. Although in agreement that he engaged in a heated debate with Complainant over the validity of the test, Kerr's recounting of this disagreement varied somewhat from Complainant's. Kerr testified that, when Complainant informed him that he would not "sign off" on the test -- indicating that it had been successfully performed -- Kerr told him that he, i.e. Kerr, would take that responsibility. Kerr also testified that he then told Complainant that he could perform the next pressure test for as long a period as required until Complainant felt satisfied with the results. (TR 1436).

Scott -- to whom Complainant first complained regarding the test results -- was a witness to the ensuing argument between Complainant and Kerr. He provided the following account thereof:

> The substance of the argument was that Terry (Complainant) proved the point that this leak existed. The gauge did not pick it up within a forty-five minute period, and Richard [Kerr] was saying, "Well, then, we'll run the test if it takes something like all night to run the test. We'll stay here and run the test." And Terry, at that point, was upset because of the hours that were, you know, kind of layed out by Richard, that we'd have to stay there to run the test, but basically that was it. It was more of a personal type argument with some technical jargon thrown into it.

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(TR 1231)

Although Lash had been informed of the leak at the time it was detected by Complainant, he remained at the transmitter area while the argument between

Complainant and Kerr took place at the isolator area. He therefore was not a witness to the argument and was unable to testify regarding statements made therein.

Kerr testified that, subsequent to his discussion with Complainant, he went to talk with Lash in the transmitter area. It was then that he was notified of the leak. A fitting was tightened in the area of the leak and the test was restarted for another forty-five minute period.

Upon completion of the second pressure test, a meeting was held in the trailer of the site manager, Don Wieland, at which only the team members were present. Complainant again voiced his complaints about the pressure test. Complainant testified that he also requested that Kerr send by electronic mail to Employer's office in Pittsburgh a memo written by Complainant addressing the testing procedure. (TR 87, 379). That proposed memo, CX-14, reads as follows:

> During the pressure test of Train "A" RVLIS system it was observed that although the system pressure was rising and the procedure was near the sign off point a pin hole leak was not detectable using a digital Ametek gage (5 psi accuracy, SCALE 0-5000 psi, reading to the nearest pound (no tenths)). It is recommended that the following changes be made to the procedure:
> 1. The test is not to be started until the system pressure has settled out and risen to and leveled out at a constant pressure for an appropriate time period.
> 2. The test should be continued in excess of one hour beyond the settling out period. This is necessary to avoid having an undetected leak (up to one lb/hour) using the Ametek gage provided by the customer.
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> This is only a recommendation to the RVLIS fill team and should at least be considered during this fill, with this instrumentation to avoid the possibility of a leak in the system causing eventual failure of a portion of the system.

Complainant's testimony that he read this memo to the other team leaders in addition to requesting that it be transmitted to Pittsburgh (TR 91) is inconsistent with the recollection of both Kerr and Scott. Kerr testified that he saw a piece of paper in Complainant's hands during the discussion in the trailer but did not recall any comments being made in regard thereto. (TR 1452). Scott -- consistent with Kerr's testimony -- recalled seeing this document but testified that he was unaware as to what was written on it. (TR 1232). Although Kerr claims to have neither seen nor having been read the contents of Complainant's memo, he did testify that Complainant requested that the subject of their discussion -- the pressure testing -- be sent to Pittsburgh by electronic mail. Kerr recalls Complainant presenting this request as part of an "either or" situation -- either send the mailing or make an entry into the site log reflecting the discussion. (TR 1489). According to Kerr, he suggested to Complainant that the complaints be entered into the Open Item Summary Sheet. (EX 41) Kerr explained that the purpose of the open item entry was to enter "something that you are unsure of or wanted to have clarified later." (TR 145.). The

record evidence does not reflect that any such entry was ever made regarding the pressure test.

Kerr testified that sometime on June 13 he acceded to Complainant's request to enter the complaints into the site log as attached comments. A review of the site log entry pertaining to the June 13 work shift reveals that no such comments were ever attached, despite Kerr's notation: "see attached comments." Kerr testified that Complainant never supplied him with any comments to be attached to the site log (TR 1456). According to Scott, Complainant's desire was to have the procedure reflect what gauge was being used, not to institute a change in the gauge used. (TR 1235).

Per Scott's suggestion, the pressure test was re-run the following day, still utilizing an Ametek gauge but conducted over a two hour period. No leaks were then detected. Both Kerr and Scott testified that there was no further discussion concerning the pressure testing. (TR 1246, 1459). Complainant could not recall ever voicing any further complaints over the testing procedure subsequent to June 13. (TR 396). Lash testified that during the period he remained on the team Complainant continued to complain to him about the pressure testing procedure (TR 1289). Lash did not discuss these complaints with any of his superiors, with the possible exception of Mark Marscher. (TR 1290-1291). Kerr testified that he notified Marscher that the team was repressure testing train "A" (TR 1460), but did not inform anyone as to Complainant's complaints regarding the testing procedure (TR 1463).

Complainant testified that, at some point subsequent to the disagreement on June 13, he decided to inquire into Employer's procedure for raising nuclear safety concerns:

> I worried enough about the problem that I wanted to make sure that the lines of communication were being taken care of and what my chain of command and how the Georgia Power quality concern program really fit into this chain of command. So, I called June Speranza [an employee in Employer's personnel department] and asked her several questions. (TR 111). Speranza informed Complainant that, before he did anything else, he should bring up such concerns to his first line of supervision, in this case Kerr. (TR 112). Complainant did not discuss with Speranza any of the specific problems he wished to report. (TR 384).

The quality concern program referred to above was created on January 1, 1984 by Georgia Power Company from "a perceived need to provide an outlet for employees who had concerns or questions regarding nuclear safety." (TR 462). This program utilized several methods in order to ensure that workers at Georgia Power understood their obligation to report safety concerns: 1. an orientation wherein each employee is given an explanation of the program and acknowledges in writing their obligation under the program; 2. the installation of drop boxes and posters (EX 15) around the Vogtle site explaining

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the program and providing the employee with an easy means of reporting quality concerns; 3. the distribution of publications which publicized the program. (TR 464). According to Charles Whitney, a Georgia Power employee involved in the creation of the program, Employer was "very, very cooperative and supporting" of this program. (TR 465). He estimates that, since its inception, the program has received fifty reports of quality concerns, all of which were investigated.

As stipulated between the parties, Complainant did call Whitney in reference to a safety complaint on July 11, 1986. He did not, however, report any such safety concerns with the quality concern program prior to this date.

Following the completion of the pressure testing, the team proceeded on to the next procedure -- drawing a vacuum in the system so as to evacuate the system of nitrogen. Once the nitrogen is evacuated from the system, it is replaced with the de-aerated, demineralized water. Complainant testified that the test data on this twenty-four hour test was not coming in correctly, possibly signaling a leak in the system or the presence of oil or water in the system. (TR 112-113). He testified that this problem was orally communicated to Kerr, but no response was forthcoming. (TR 112-117). According to Scott, however, the vacuum test was successful -- the data generated by the test, and seen by all of the team members, was correct. (TR 1253).

After the vacuum tests had been completed, the team began The process of filling the RVLIS with water. On or around June 23, Complainant and Scott were informed by Lash that the latter had discovered a foreign substance -- later identified as oil -- in the capillary lines. Lash made this discovery on June 21 and told Kerr of the problem that day. Kerr did not inform Scott, Complainant or any personnel from Georgia Power for another three days or so. His reason given for not notifying others of the problem sooner was that:

> Mr. Lash really wasn't sure what he had. I didn't want to say anything prematurely, and the fact that if Mr. Lash did see oil there, I didn't want [Complainant) to go running to the customer telling them. I didn't know what we had, let alone

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> how to repair it, or let alone have the answers to the utility on what to do. I didn't want to look stupid. I wanted to get with Pittsburgh and see what they would advise.

(TR 1467)

Upon finally being told of the existence of a foreign substance in the system, both Scott and Complainant complained to Kerr about not having been notified of the problem when it was detected. Complainant testified that:

> Once I learned that there was, that Richard Kerr had known that there was oil in the system ahead of time, and I found out about it and I brought that to his attention immediately and was very upset that he hadn't told the team that he knew there was oil in there and I was very upset that he hadn't told Georgia Power that there was oil, contaminated oil in the system, not just oil.

(TR 118). Complainant believed at that time that the presence of the oil presented a potentially dangerous situation. (TR 118).

Kerr testified that, on June 23, Complainant approached him and was "yelling and screaming at me, saying that he was not aware of our work plans for that day. At the end of his screaming, he mentioned something that I wasn't telling him everything. I was hiding something from him." (TR 1467). Subsequent to this conversation, Kerr spoke with Mark Marscher in Pittsburgh informing him that oil had been discovered in the RVLIS. Marscher in turn informed Bill Pekarek of both the problem and the proposed solution of this problem -- flushing the oil from the RVLIS. Kerr did not at that time inform Marscher or anyone else in Pittsburgh of the complaints registered by Complainant over this matter. (TR 741, 948, 1369, 1468).

At some point after the flushing of the capillary lines, a problem existed with the RVLIS transmitters. According to Complainant, this problem occurred around July 8 while he was working in containment. Complainant testified that he suggested to Kerr that the transmitters should be replaced and not just repaired. (TR 124). Complainant testified further

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that it was his belief that because Kerr was then working alone on the RVLIS he did not want to hear the comments on the transmitters but would instead solve the problem himself. (TR 126).

Kerr's recollection of the transmitter problem varied in many aspects from that of Complainant. First, he recalls the problem occurring on June 26 when all the team members were still working on the site. (TR 1473). A meeting was held the following day at which time the team members discussed the problem of the transmitter's inability to calibrate. Kerr claims that Complainant took notes of this meeting, this note (EX-8) thereafter relied upon by Kerr when he and Lash discussed the matter with the utility personnel. Kerr also testified that he and Complainant had discussions about this problem but Complainant at no time complained about safety hazards related thereto. (TR 1482).

On June 29, both Lash and Scott left the work site and returned to Pittsburgh because "the remaining part of the RVLIS job no longer required four engineers. It was a two-man operation then." (TR 1492). Kerr and Complainant continued to work at the site with no engineers being sent to replace the departed Scott and Lash.

On or about July 8, Complainant was transferred to the containment portion of the project, an area unrelated to the RVLIS. The reason given for this change was, again, that not much work remained to be done on the RVLIS and that Complainant was no longer needed on that portion of the job.

On July 10 Kerr telephoned Bill Pekarek and Joel Terry in Pittsburgh and alleged that he had been assaulted by Complainant the prior evening in the Ramada Inn parking lot. A few hours later, Complainant was summoned into the office of the site manager, Don Wieland, and told by Wieland to call the Pittsburgh office. Complainant thereupon spoke via speaker phone with Pekarek and Terry. He was told to leave the site that day and return to Pittsburgh by way of an airplane flight that had been reserved for him at 9:00 that evening. As admitted by Pekarek, it was his and Terry's intention to get Complainant off of the site and back to Pittsburgh as quickly as possible. A meeting was scheduled for the following morning. At this point Complainant was not informed as to the

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reason for his removal from the site or the proposed agenda for the meeting.

On July 11, Complainant went to a meeting attended by Pekarek, Terry, Robert Campbell -- Terry's supervisor, and Greg Holtz, manager of Employer's human resources division. An agenda for this meeting was prepared by both Terry (EX-24) and Holtz (EX-29). In addition, both Complainant and Holtz compiled notes of the topics discussed during the meeting. (CX-16, CX-17, EX-28). The topics of discussion were as follows:

> 1. Based upon information elicited from Marscher, Complainant was accused of sleeping in a trailer while work was being performed during a Prairie Island job in February or March of 1986. Complainant was also accused of threatening Marscher with bodily harm upon becoming aware that Marscher notified the team leader, Ron Kraszewski, of Complainant's sleeping in the trailer. When informed of this accusation at the meeting, Complainant denied that the incident or the threat had occurred and claimed that Kraszewski could verify his version of this event.
> 2. Complainant was informed that, contrary to Employer's policies, he had cashed four $600 travel letters, also referred to as GELCO vouchers. Employees are permitted to cash up to a maximum of $600 in travel letters in each two week period as a cash advance for expenses incurred while on company business. Terry informed Complainant that he had cashed four such letters between April 13 and May 19 of 1986 when no money was owed him by the Employer and no field assignments were anticipated. At the meeting, Complainant was shown a computer printout of his GELCO account status. He responded to the aforementioned claim by stating that he would have to check his records in order to determine the accuracy of his account status.
> 3. On June 29, 1986, Complainant allegedly kicked and dented the rental car which was parked in the Ramada Inn parking lot. Complainant did admit to

having hit the side of the car with his hand as it was driving off with the other team members. He defended this conduct by

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explaining that he was suffering from diarrhea, thus causing him to be in his hotel room when the others were ready to leave. (TR 1004-1005). He denied that any damage to the car had resulted from his hitting the car. (TR 1005).

4. Employer has an arrangement with American Express whereby its employees are issued American Express cards, the annual fee for which is paid by Employer. The employee is responsible for paying the charges promptly although Employer has agreed to pay American Express any amounts not so paid by the employee. The employee must then reimburse Employer for this amount. (TR 1031, EX-17). At the meeting, Complainant was confronted with the claim that his American Express card had been cancelled in April 1986 due to delinquency of payments, yet Complainant continued to use the card for personal business despite the fact that the card had not been reinstated. Complainant's notes of the meeting indicate that Complainant responded that his card had been reinstated and that the charges in question were not personal in nature but were related to work he was then performing at another work site. (CX 16).

5. Complainant was the team leader at the OCONEE work site in February and March of 1986. At the July 11 meeting, Complainant was accused of having failed to carry out his manager' s order of reporting the daily status of that RVLIS job. He was also accused of having avoided returning his manager's phone calls from Pittsburgh. (TR 984; EX-24). Upon his return from this work site, Complainant was reprimanded by Pekarek for these failures. (TR 986). The record evidence does not indicate any response by Complainant regarding this topic.

6. Complainant was alleged to have flown to the OCONEE work site a woman who was not his wife, an act which is in violation of Employer's policies. According to Complainant's notes of the meeting, he denied this allegation and offered by way of explanation the fact that a neighbor of his parents attended school in the vicinity of the OCONEE work site. (CX-16).

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7. Complainant was informed of Kerr's accusation that he had been assaulted by Complainant in the Ramada Inn parking lot on July 9. Kerr's version of this incident, as related to Complainant at this meeting, goes as follows: Kerr and Complainant had returned to the hotel after the second rental car which Complainant had been driving was returned at the Bush Field Airport. As the two were walking away from the car, separated by ten to fifteen feet, Kerr told Complainant, "please, don't change hotels". Kerr claims that this was in response to Complainant's requests -- denied by management -- that he be allowed to change hotels. Complainant responded by yelling, "what are you telling Pittsburgh", and then charging at Kerr. He thereupon punched Kerr in the right arm, kicked him on the upper left thigh, and grabbed Kerr, throwing him against the car. After Kerr broke free of Complainant's grasp, Complainant again asked,

> "What are you telling Pittsburgh", to which Kerr responded, "it's no concern of yours". Both of them then went into their respective hotel rooms. (TR 1401-1410).

After being told of this alleged assault on Kerr, Complainant denied having ever touched Kerr. Instead, he stated that, upon returning to the hotel:

> We both got out of the car. I asked Richard Kerr for the keys to the car so that I could go to dinner, and he gave me those keys and I started to return to my room. Richard yelled out that, "By the way, you're not going to be allowed switch (sic) hotels and that your wife is not going to be allowed to be flown in". And then I yelled back that I felt that he hadn't been communicating my concerns with my family back to Pittsburgh or the project problems that had been brought up. I yelled a few names, walked to my room, which was only several yards away at the time, opened the door, slammed the door ...

(TR 145-146). Complainant further denied any other encounters with Kerr later that night or the next morning, i.e., July 10, 1986, when they rode together to the work site. (TR 147).

In addition to denying that he had ever assaulted Kerr, Complainant stated at the meeting that he had knowledge of an incident involving Kerr and another Westinghouse employee at the Vogtle site. Complainant also stated that, despite this other employee's assault on Kerr, no disciplinary action was taken by Employer. Complainant did not at that time indicate the identity of this other employee.

Complainant testified that, during the course of the meeting, he raised concerns regarding nuclear safety and quality at the Vogtle site. (TR 169). According to his testimony, and the notes he prepared as a recap of the meeting, the concerns which he voiced at that time were as follows:

> I pointed out to Mr. Campbell that our engineers, unlike most of ITTC manufactured product line, that we are the engineers that solve problems, that we make money from the solving of these problems. This job will be three times the income to Westinghouse and Georgia Power will be glad to pay for this. They have seen the hard work all of us had put in (J. Lash, G. Scott, T. Dysert, R. Kerr). At $108/hr. we would make a lot of money for the company and the customer would pay the bills. Richard Kerr had controlled communication (asked us not to call Pittsburgh, he would transmit our requests, etc; he obviously did not). He hid oil fill into hot leg, it spilling the water onto power source, and burnt up two transmitters; gave false time estimates; reported that Pittsburgh (Mark Marscher and Bill Pekarek) said to get the customer to buy off system even if it was filled with oil, slow response times, possible leaks.

(TR 170-171; CX-16, pg. 5)

Pekarek, Terry and Holtz all testified that they did not recall Complainant raising any concerns regarding nuclear safety or quality at the meeting. (TR 733, 932, 1083). Both Pekarek and Holtz stated that Complainant voiced complaints about Kerr, dealing with Kerr's concern with getting a promotion. (TR 734, 1085). Pekarek and Terry further testified that Complainant felt Kerr was not honest with Georgia Power in that he had underestimated the time needed to vacuum fill the containment pressure portion of the RVLIS. (TR 734, 935). Finally, Holtz recalled that there was some

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discussion concerning oil in the system but, not being an engineer, he was unaware as to the true substance of this discussion. (TR 1093).

Approximately halfway through this one hour meeting a short break was taken with only Complainant leaving the room. A short time later, he returned with Harvey Daniels, who was introduced as Complainant's attorney. A brief discussion ensued with Holtz informing Complainant that "this was an internal Westinghouse meeting between an employer and his manager and management, and Mr. Holtz was representing the employee ... as well as monitoring the meeting, and that it was inappropriate to have outside legal counsel." (TR 995). Security guards were then summoned to the meeting and escorted Mr. Daniels from the meeting.

At the termination of the hearing, Complainant requested he be given a copy of any notes of the meeting and his personnel files. This request was denied by Holtz on the ground that there was the potential of a lawsuit in connection with the matter. (TR 1142). Complainant was given permission to look through his files, but no copies of its contents were allowed to be made.

Toward the end of the meeting, Complainant was notified that he was being suspended for one week during which time Holtz would conduct an investigation designed to determine whether Complainant had struck Kerr as the latter had alleged. A letter of termination dated July 11 (EX-22) had been prepared for Complainant in anticipation of his admitting to the assault. Upon conclusion of the meeting, and based upon Complainant's denials, the letter of termination was voided and the investigation was undertaken.

As part of this investigation, interviews were conducted with Lash, Scott, Kerr, Marscher, Pekarek and James Lewis, a team member of Complainant's on a prior job. Complainant was not questioned subsequent to the July 11 meeting (TR 1000), and was not asked as to whether he knew of any witnesses or documents which might support his position. (TR 1007).

Based upon the findings of the investigation, which was conducted on July 11 and July 14, the conclusion was reached by the Employer that Complainant had, in fact, attacked Kerr on July 9. Although there were no witnesses to this incident,

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Terry, Pekarek and Holtz accepted Kerr's version over Complainant's because of what they regarded as Complainant's lack of credibility. This finding of a lack of credibility was in turn based upon the results of the investigation.

According to Terry, the results of the investigation proved correct Marscher's allegation that he had been threatened by Complainant while both were working at Prairie Island. Marscher's account of the incident was corroborated by James Lewis, another field service engineer working at that work site. (TR 1036).

Based upon the consistency of the statements made by Lash, Scott and Kerr, Terry concluded that:

> A car kicking incident had occurred and that the consistency of the stories of the three other individuals, and the fact that Mr. Dysert's story was inconsistent with that, led me to believe that Mr. Dysert was not telling me the full truth.

(TR 1043) <

The investigation also focused on the alleged altercation between Kerr and the other employee, eventually identified as Scott. It was discovered that the two had engaged in an argument a few days prior to Scott's departure from the Vogtle site. At some point during this argument, Scott grabbed Kerr's arm, moved him over against a nearby wall and told Kerr to leave him alone. Terry concluded that, while this incident took place, Scott had not attacked Kerr and it was "not a big deal." (TR 923).

Holtz testified that, as a result of the investigation, he concluded that Complainant's American Express card had been properly cancelled on account of delinquent payments, indicating to Holtz that Complainant "had not met parts of the things that he was expected to as an employee". (TR 1119). Holtz further concluded that the four $600 travel letters were open items that were delinquent, thus impacting on Complainant's credibility as it showed he was not following account practices and procedures. (TR 1120).

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Also taken into account when judging Complainant's credibility was an incident which had taken place around March of 1986 and made known to Pekarek on July 1 . Pekarek testified that Complainant:

> had shown various fits of temper and on one occasion after he had returned from site and was in the office for a period of time, an error had been made in the submission of overtime sheets, and he did not get his overtime in his paycheck at the end of the month and he approached Mr. Joel Terry's secretary and ... stood in front of her yelling and screaming that he didn't get his overtime.

(TR 646-647) Holtz also concluded that this screaming incident, coupled with Complainant's kicking of the rental car, demonstrated a "temper-controlling problem". (TR 1122).

Terry summed up his conclusions regarding the results of the investigation thusly:

> I had reviewed several issues with Mr. Dysert that had been reported to me from a number of individuals. Mr. Dysert had provided me input that morning with regard to his position on these incidents. I reviewed in much more detail with each of the individuals and the end result being that I believed that either all of those individuals were lying, or Mr. Dysert was. I concluded that Mr. Dysert was not telling the truth in regard to not having attacked Richard Kerr.

(TR 955-956).

Pekarek likewise found the results of the investigation unsupportive of Complainant's position. In describing his view of these results, he testified:

> I was sitting in a meeting with Mr. Holtz and Mr. Terry and listening to the results of the investigation, in which I didn't partake, but heard the results, and I had also heard Mr. Terry completely deny all the allegations in the meeting of the 11th in which five or six people stated and these people, I know, have shown me no reason not

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> to believe them. Yet Mr. Dysert sat there and denied that all of those things happened and I found that very difficult to believe, because the credibility of the individuals involved is quite high in my opinion.

(TR 707).

Having reached a consensus that Complainant had in fact attacked Kerr, the decision was made by Terry, Pekarek and Holtz that Complainant should be terminated. Although Employer does not maintain a written policy relating to the striking of one employee by another (TR 827, 1012), both Terry and Holtz testified that there is an unwritten customary procedure which calls for termination of the offending employee. (TR 1012, 1067). Terry, Pekarek, Holtz and Marscher testified that, when the decision was made on July 14 to terminate Complainant, they had no knowledge that Complainant was complaining to anyone regarding nuclear safety at the Vogtle RVLIS fill. (TR 738, 952, 1086, 1360).

A second meeting with Complainant was held on July 17, with Terry, Pekarek, Holtz, Campbell and Speranza also in attendance. At this meeting, Complainant discussed the problems related to the pressure testing, oil in the capillaries, and transmitters, all of which he perceived as posing a safety hazard. Also discussed was Complainant's dissatisfaction with the lack of communication between Kerr and Employer and Georgia Power regarding these problems. Complainant testified that he raised these concerns at the July 17 meeting as he had at the earlier July 11 meeting, but the others in attendance "weren't concerned with those items at that time" and thus deemed them "irrelevant". (TR 160). According to Pekarek and Holtz, such concerns were first made known to them at this meeting. (TR 739. 1086). Aside from Complainant's aforementioned statement, the record evidence does not reveal what response, if any, was rendered on the subject of these quality concerns.

Toward the end of this meeting, Complainant was notified that it was Employer's decision to terminate Complainant as a result of his alleged assault on Kerr. Complainant at this time again renewed his request to be given his personnel file

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and also asked for all of the notes which were generated on account of the meeting. As was the case with the July 11 meeting, Complainant's request was refused as the decision to terminate could result in litigation. (TR 1023).

Discussion of Applicable Law and Regulations

Section 5851(a) of the ERA prohibits the discharge of an employee because the employee has:

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter of the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (2) testified or is about to testify in any such proceeding, or;
> (3) assisted or participated or is about to assist or participate in any manner in such proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. 2011 et seq.].

It is undisputed that Complainant was discharged by Employer on July 17, 1986. It is equally undisputed that prior to discharge Complainant was not involved in any manner in the commencement of a proceeding under the ERA, nor had he testified or prepared to testify in any such proceeding. Further, there is no claim as to his assistance or participation in such proceeding. Thus, the threshold issue to be resolved is whether

Complainant assisted or participated "in any other action" to carry out the purposes of the ERA.

Clearly, the complaints voiced by Complainant over such matters as to the pressure testing and the presence of oil in the capillaries should be regarded as purely intracorporate quality control concerns. A review of the case law on this issue reveals two disparate views as to whether such internal complaints are afforded the protection from retaliation provided by §5851.

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Standing for the proposition that intracorporate quality complaints are not protected by the statute is the Fifth Circuit's ruling in *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984.) In that case the Court relied on several factors in holding that the internal quality control report filed by the employee was not so protected. First, the Court noted that the language of Section 5851 cannot be construed so as to afford such protection. The act of filing the quality control report, the Court found, does not constitute participation "in any other action":

> Because the general term "in any other action" follows a reference to specific types of proceedings, it is most reasonable to presume that the term "actions" refers to something similar to the specific proceedings mentioned earlier in the sentence.

Brown, at 1032.

The Court also found the language supportive of its holding in that the word "in" preceding "any other action" implies "a kind of structured proceeding in which a person may participate, not just any act a person may perform". *Id*, at 1032.

In addition to sticking to a strict interpretation of the language of the statute, the Court in *Brown* relied on the legislative history of section 5851. According to the Court, this history demonstrates Congress' unwillingness to broaden the protection under the ERA. The Conference Committee report indicates that section 5851 is meant to provide protection from discharges as a result of "taking part or assisting in administrative or legal proceedings of the [Nuclear Regulatory] Commission". H.R. Rep. No. 1796, 95th Cong., 2 Sess. 16-17 (1978), U.S. Code Cong. & Admin. News, 1978, pp 7303, 7309. Moreover, the Report of the Senate Committee on Environment and Public workers indicates that protection is meant to be restricted to those who have "testified, given evidence, or brought suit under . . . [the Acts]". S. Rep. No. 848, 95th Cong. 2d Sess. 29 (1978), U.S. Code Cong. & Admin. News 1978, p. 7303.

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Other jurisdictions which have dealth with this particular issue have rendered holdings contrary to the holding in *Brown & Root*. In *Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984), and *Consolidated Edison Co. of NY Inc. v. Donovan*, 673 F.2d 61 (2d Cir. 1982), the ERA was found to provide protection to internal complaints. In *Kansas Gas* and *Mackowiak*, comparisons were made to the employee protections of the National Labor Relations Act and the Federal Mining Safety Act, two statutes after which the ERA was patterned. These acts have been interpreted as guaranteeing protection to employees for strictly internal actions. *NLRB v. Schrivener*, 405 U.S. 117 (1972), *NLRB v. Retail Employees Union Local 876*, 570 F.2d 586 (6th Cir.), *cert. denied*, 439 U.S. 819 (1978), *Phillips v. Dept. of Interior Board of Mine Appeals*, 500 F.2d 772 (D.C. Cir. 1974), *cert. denied*, 420 U.S. 938, *Donovan v. Stafford Construction Co.*, 732 F-2d 954 (D.C. Cir. 1984). Contrary to the determination of the *Brown* court, the *Kansas Gas* court found that "the legislative history of the FMSA amendment shows that Congress did, in fact, intend the older version of the amendment to afford protection to internal complaints and the older version of the amendment is what the ERA provision was modeled after". *Kansas Gas*, at 1511. Therefore, just because the 1977 amendment to the FMSA contained language which expressly included internal complaints and protection -- while the ERA does not contain such language -- does not ipso facto preclude protection of internal complaints under the ERA.

Having reviewed the case law relevant to this issue, I am of the opinion that the determination of the *Brown* court that the ERA does not provide protection to internal complaints is the better view. Such an approach appears to be more in accord with the language of the statute and the intent of Congress, as reflected in the ERA's legislative history. As such, I find that Complainant was not engaging in protected activity when he voiced complaints regarding the safety of the RVLIS. Furthermore, in view of my Findings of Fact (see below), even if such activity is protected as a matter of law, the Complainant cannot prevail in this action because said activity was not the cause of his employment being terminated.

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Findings of Fact

After a careful review of all of the evidence of record, I make the following Findings of Fact:

1. Complainant did, in fact, make complaints regarding the safety and quality of the procedures used in the testing and installing of the system. However such complaints were made only to the other members of this team and were entirely internal in nature.
2. After said complaints were made, the system was re-tested by the team and the complaints were resolved to everyone's satisfaction (including Complainant's)

prior to the Complainant's being notified to return to Pittsburgh for the meetings which eventually resulted in his termination of employment.
3. Complainant did, in fact, have an altercation with Kerr on July 9 and did, in fact, assault Kerr. The reasons for the altercation and the assault derived solely from causes other than the complaints made by Complainant regarding the safety and quality of the procedures, used in the testing and installing of the system.
4. After making an investigation Complainant's superiors at Employer reached a conclusion, in good faith and supported by the evidence developed by said investigation, that Complainant had, in fact, assaulted Kerr and had, in fact, committed other acts which violated company rules and policies.
5. Employer's decision to terminate Complainant's employment was based solely on its good faith belief that Complainant had assaulted Kerr and had committed other acts violative of company rules and policies and was, in no way, based on Complainant' s complaints regarding the safety and quality of the procedures used in testing and installing of the system.

Conclusions of Law

1. The Complainant was not engaged in protected activity under the provisions of Section 5851(a) since all of his complaints were strictly intracorporate and internal in nature and such activity is not protected under said section.

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2. Even if said activity is held to be protected activity under Section 5851(a) the Complainant cannot prevail in this action because he was not discharged because of said activity.

Order

For the foregoing reasons, it is ORDERED that the complaint be DENIED.

GEORGE G. PIERCE
Administrative Law Judge

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